were not in dispute are as follows. From January 1976 to September 1976 the company paid to Braddell Brothers a retaining fee of $1,500 a month and the company provided two rooms in the company's offices and a secretary for the use of the defendant and a Legal Assistant of Braddell Brothers. The defendant during a period of nine months devoted practically the whole of his time in advising the company over the problems confronting the company arising out of its dispute with associated companies. In connection with such disputes and litigation therefrom the defendant made four visits to London.

Having regard to these facts and all the circumstances, although it is not inconceivable that the defendant might be able to justify his bill of $500,000 for professional services rendered in respect of the "Haw Par/Slater Walker Dispute" if it were taxed, I considered that the lump sum of $500,000 for the defendant's services as set out in that bill is, to use the words of Brown L.J. in *Re Boycott*,[1] "redolent of overcharge". Even if it is to be assumed that the defendant worked everyday including Saturdays and Sundays throughout the nine months period, i.e. 270 days, that bill works out to a charge of $1,850 per day or $185 per hour, assuming an abnormal ten hour working day. In my judgment, purely on this test that bill ought to be taxed and I should not be surprised to see that on taxation it is substantially reduced. In the light of my view on that one bill I was satisfied that all the other bills should also be taxed.

Order accordingly.

Solicitors: *Shook Lin & Bok; Braddell Bros.*

MALAYSIAN REPORTS

NGUI MUI KHIN & ANOR. v. GILLESPIE BROS. & CO. LTD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Salleh Abas F.JJ.) October 13, 1979]

[Johore Bahru — Federal Court Civil Appeal No. 161 of 1978]

Practice and Procedure — Transactions entered into by confirming house — Guarantee — Whether transaction entered into with confirming house a moneylending transaction — Moneylenders Ordinance, 1951, s. 2.

Commercial Law — Confirming house — Functions and obligations — Transaction not money-lending — Moneylenders Ordinance, 1951, s. 2.

Private International Law — Contract made outside jurisdiction — Whether enforceable in Malaysia — Contracts Act, 1950, s. 24.

In this case certain transactions took place between the respondents, a London confirming house and a Singapore company relating to the financing of purchases of goods by the Singapore company. The appellants gave a guarantee to the respondents with respect to those transactions. The respondents obtained judgment in the Singapore High Court against the Singapore Company and as the judgment remained unsatisfied, they sued the appellants on the guarantee. The appellants in their defence contended that they were not liable on the guarantee because the transactions between the respondents and the Singapore company were in essence moneylending transactions.

The respondents applied for final judgment under Order 14 and their application was granted by the Assistant Registrar. An appeal to the High Court was dismissed and the appellants appealed to the Federal Court.

Held: (1) confirming houses are a recognised institution in the promotion and participation of export trade and their business being distinct, the transactions entered into by them with the parties in the export trade could not be held to be moneylending transactions;

(2) the learned judge was correct in holding that the appellants' statement of defence did not disclose any serious defence requiring trial. There being no triable issue, the order under Order 14 was correctly made.

Cases referred to:-

(1) *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2 Q.B. 127.

(2) *Urquhart Lindsay & Co.* v. *Eastern Bank* [1922] 1 K.B. 318.

(3) *Anglo-African Shipping Company* v. *J. Mortner Limited* [1962] 1 Lloyds R. 610, 620.

(4) *Sobell Industries Ltd.* v. *Cory Brothers & Co. Ltd.* [1955] 2 Lloyds R. 82, 90.

(5) *Rusholme & Bolton & Roberts Hadfield Ltd.* v. *S.G. Read Co. (London) Ltd.* [1955] 1 All E.R. 180.

(6) *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* [1962] A.C. 209, 218; [1962] M.L.J. 74.

(7) *Litchfield* v. *Dreyfus* [1906] 1 K.B. 584.

(8) *Transport and General Credit Corporation* v. *Morgan* [1939] 1 Ch. 531.

FEDERAL COURT.

T.S. Chong for the appellants.

N. Jagatheesan for the respondents.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): In this appeal certain transactions took place in Singapore between the respondents, a London confirming house, and a Singapore company known as Southern Equipment Suppliers (S) Private Limited, re-

lating to the financing of purchases of goods by the latter. The appellants who are the directors of Southern Equipment Suppliers (S) Pte. Ltd. and live in Johore Bharu, gave a guarantee to the respondents with respect to those transactions. The question to be determined in this appeal is whether by entering into those transactions the respondents are a moneylender within the meaning of our Moneylenders' Ordinance No. 42 of 1951, so that the guarantee which the respondents sought to enforce against the appellants is unenforceable, as to do so would be to undermine our Moneylenders' Ordinance, 1951.

It is a general principle of law that any transaction taking place outside the jurisdiction can only be enforced in the local courts if they are not contrary to the local law and regulations. Under the continental system the priority of *lex loci* over *lex fori* is based on the doctrine of *odre* public or *jus cogens* under which any domestic law designed to protect public welfare and morals must prevail over an inconsistent foreign rule. In English legal system, foreign law is recognised only if it is not repugnant to the distinctive policy of English law, be it statute or common law. This principle as regards Malaysian law of contracts can be found embodied in section 24 of the Contracts Act, 1950, Act 136. (See also *Cheshire's* Private International Law: 9th Ed. pages 134-139). Thus the point is well taken if it can be shown that the transactions between the respondents and Southern Equipment Suppliers (S) Pte. Ltd. are moneylending transactions, and that by entering into these transactions and by their business practice as a confirming house they are moneylenders. Before dealing with the submission, it is necessary to state in some detail the facts of this case.

The respondents are a company incorporated on November 5, 1927 in the United Kingdom carrying on *inter alia*, the business of a confirming house. On April 18, 1975, they entered into an agreement with Southern Equipment Suppliers (S) Pte. Ltd. (referred to in this judgment as the client) whereby they gave the client confirming facilities for the client's purchases of goods from a supplier in the United Kingdom. According to the agreement, the respondents would confirm the purchases made by the client, pay for the goods and draw a fixed date bill of exchange covering the confirming facilities so granted; each bill to be drawn for acceptance by the client against shipping documents on the arrival of the steamer carrying the goods, and payable 150 days thereafter. For the services rendered the respondents were to charge a 3% commission on the c.i.f. value of shipments with a minimum of £50 per shipment. Interest at the prevailing rate was also payable on the date of payment on the principal sum of the bill for the period of credit granted. All other charges, such as Bank's letters of credit, cables, postages, petty airmail postages, local taxes etc. were all for the client's account. The respondents would arrange for marine insurance, but they were not responsible for the outturn of the quality of the goods, although they were willing to assist the client should there be any problems arising relating thereto. The confirming facilities were granted on condition that the appellants should stand as guarantors. Consequently, on the same date, i.e. April 18, 1975, both the appellants signed in Singapore a guarantee stating that they requested the respondents to act as a confirming house for the client and "to confirm purchases of goods for the client and to accept, negotiate or purchase any bills or drafts on behalf of the client and/or to give or arrange credit or accommodation or financial facilities to or for the client". By the guarantee which was to be governed by English law, the appellants agreed, among other things, to pay on demand all sums which might become due from the client to the respondents and other sums which the respondents might be liable to pay to a third party as a result of the respondents' transactions with the client. The respondents' books of account or other usual documents shall be conclusive proof of all or any sums due by the appellants under the guarantee.

Pursuant to the agreement and the guarantee, two shipments of goods were sent to the client. According to the uncontroverted affidavits of Tng Chua Hock sworn on behalf of the respondents, the respondents having paid the prices of goods by themselves or one of their subsidiaries accepting bills of exchange drawn on them by the supplier of goods, the respondents in turn drew two U.S. dollar drafts to cover these two shipments. These were USD 093 for US$46,491.62 and USD 104 for US$19,657.02 and both drafts were accepted by the client. However, upon presentation on maturity dates, they were dishonoured. The respondents then took legal action in Singapore High Court and obtained a judgment in default against the client. As the judgment remains unsatisfied, the respondents commenced a civil suit in the High Court Johore Bharu suing the appellants on the guarantee which they signed on April 10, 1975. The appellants filed their statement of defence contending that they are not liable on the guarantee because the transactions between the respondents and the client were in essence moneylending transactions, and unless they can show that they are permitted by the laws in Malaysia to lend money with interest by way of business, they are prohibited to enforce the guarantee against the appellants. Being of the view that the appellants had no defence to the suit, the respondents applied for a final judgment under Order 14. A Senior Assistant Registrar who heard the application granted the respondents' prayer. The appellants appealed against this decision to the High Court which likewise dismissed the appellants' appeal on the ground that the appellants' defence had not disclosed any triable issue since the impugned transactions are not caught by our Moneylenders' Ordinance. Hence the appellants appealed further to the Federal Court. At our sitting in Johore Bharu we dismissed the appeal with costs and indicated that we would give our reasons for our decision later.

For the purpose of dealing with this appeal we will approach the question as follows. Firstly, we will examine what a confirming house is and what its functions and obligations are, particularly with regard to the respondents' transactions with the client. Secondly, we will look at the Moneylenders' Ordinance, 1951 itself in order to determine who is and who is not a moneylender. Only after having dealt with these two questions will we consider whether the agreement between the respondents and the client is one of money-

lending and whether by entering into the agreement they are a moneylender so that the guarantee cannot be enforced.

To regard the agreement or the transactions between the respondents and their client as being one of moneylending, and therefore the respondents as a moneylender, in our view, reflects a lack of knowledge and appreciation of the important role played by confirming houses in the financing of international trade. An importer in one country would find it difficult to buy goods on credit from a foreign seller in another country without the assistance of an intermediary unless trade relationship between the two has grown to such an extent in terms of volume and length of time that there is a mutual confidence inducing the seller to grant credit to the buyer. A newcomer in import and export trade would find it virtually impossible to buy goods from a foreign seller unless he has ready cash to pay for them. Likewise, a seller in such trade will be reluctant and not able to sell his goods to a foreign buyer unless he is assured of getting payment for them. Nowadays, payment for the goods is effected through banks or confirming houses. As regards payment through banks, this can be either in the form of banker's documentary credits or banker's collection arrangements depending on whether the method of payment was arranged by the buyer or by the seller. If the buyer arranges the payment, he requests his bank (known as the issuing bank) to open banker's documentary credits with a bank in the seller's country (known as the correspondent banker). This bank is bound to pay once proper shipping documents are tendered, even though in the meantime it has received instruction that the buyer has repudiated the contract. (*Hamzeh Malas & Sons* v. *British Imex Industries Ltd.*;[1] see also *Urquhart Lindsay & Co.* v. *Eastern Bank*[2]). If it is the seller who arranges the payment, he has to resort to what is known as banker's collection arrangements. By this method the seller has to instruct through his bank (known as remitting bank) a bank in the buyer's country (known as collecting bank) to collect payment for the goods. The buyer is bound to pay the collecting bank upon presentation to him of shipping documents either by handing in cash or by accepting bill of exchange drawn on him. Banker's documentary credits and collection arrangements have been developed by banks only in the last fifty years or so as a result of increased volumes of trade and commerce across the nations' frontiers. Until they have reached the present state of perfection, confirming houses played important roles of matchmaking between foreign buyers and sellers, both of whom are strangers to each other, and to this date despite the popularity of banker's documentary credits and collection arrangements, confirming houses still survive and continue to occupy important position in the financing of export trade (*Anglo-African Shipping Company* v. *J. Mortner Limited*[3]).

A confirming house, formerly known as a merchant commission and now as an export house, adopts a set pattern of business procedure. It enters into two agreements. The first agreement is between itself and a foreign buyer (known as the client) whereby the client requests the confirming house to buy goods for him. The relationship so created is one of principal and agent, i.e. the client being the principal and the confirming house being the agent. The agreement between the client and the respondents dated April 18, 1975 is a typical one. In the agreement, it is clearly spelled out that the respondents would attend to the confirmation of the client's purchases and pay the prices and that bills of exchange would be drawn and accepted by the client and that such bills were in respect of payments made by the respondents on behalf of the client (see clauses on confirming facility and acceptances of drafts and also affidavit of Tng Chua Hock). Another agreement entered into by a confirming house is one between itself and the seller from whom the confirming house bought the goods. This agreement may fall into any of the three types. The first type is where the confirming house buys the goods as an agent on behalf of the foreign buyer, in which case there is a privity of contract between the buyer and the seller, irrespective of whether the foreign principal is disclosed or not. The second type is where the confirming house buys the goods in the capacity of a principal, from whom the foreign buyer re-purchases the goods. In this case there is no privity of contract between the seller and the foreign buyer. According to Lord Diplock who wrote a dissenting judgment in *Anglo-African Shipping Company* v. *J. Mortner Ltd.*,[3] this type of agreement whereby the confirming house becomes the seller is "in the ordinary way" of the business of a confirming house meaning a common one. The third type is where the confirming house as agent of the overseas client places the client's order with the seller but indicates at the same time that it intends to hold itself personally responsible for the price. According to *Professor Schmitthoff*, The Export Trade (1969) 5th Ed. pages 145-150 this is the most typical of all the confirming arrangements. However, whatever the legal relationships created by these two agreements, the courts in England held that when a confirming house confirms the purchases of its client with the seller, it does not only assure and guarantee that payment will be made if proper documents are tendered, but also confirm the whole contract. Thus the seller is entitled to look to the confirming house personally to see that not only the payment will be made, but also the contract will be carried out by the buyer. (*Sobell Industries Ltd.* v. *Cory Brothers & Co. Ltd.*[4] *per* McNair J. at page 90).

Although a confirming house occupies an intervening position between the buyer and the seller, much the same as a bank does when it opens a confirmed irrevocable credit for its customer, the business of a confirming house is distinct from that of a bank and its obligations are not identical with those of a bank. The obligation of a bank is to pay against proper documents being tendered, whereas a confirming house, whether it purchased goods as an agent of its client or in the capacity of a principal, as we have observed earlier, is not merely liable as regards price but also for damages arising out of a breach by the client; for example, refusal to accept delivery of goods. In so far as the seller is concerned, the confirmation by a confirming house gives him an added protection not only against non-payment of the price but also against contingencies which are not purely financial. (*Rusholme & Bolton & Roberts Hadfield Ltd.* v. *S.G. Read*

Co. (London) Ltd.[5] and *Sobell Industries Ltd.* v. *Cory Brothers & Co. Ltd.*[4]).

In the present appeal, no agreement between the respondents and the U.K. supplier from whom goods were purchased was produced in court, but from the uncontroverted affidavits of Tng Chua Hock and the agreement between the respondents and the client and the guarantee signed by the appellants, it is clear that when confirming the purchases the respondents were acting as an agent of their client. They paid for the goods by themselves or one of their subsidiaries accepting bills of exchange drawn on them by the seller and they in turn drew dollar drafts for equivalent amount for acceptance by the client. Such arrangements — it seems to us — are typical of the business practices of confirming houses. It is with reference to these arrangements that we are asked by the appellants to hold that the respondents were carrying on the business of moneylending. It is true that under confirming house arrangements a foreign supplier receives payment of the goods which he sold from the confirming house and the latter in turn gets back its money plus interest from the foreign buyer for whom he acted. We do not think that such arrangements come within the definition of moneylending so as to render the respondents a moneylender. Neither the resulting debt thereby created nor the interest charged will constitute the transaction a moneylending transaction within the meaning of the Ordinance.

At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceble by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. He is a moneylender if within the meaning of section 2 of the Ordinance he can be said to be a person "whose business is that of moneylending". To prove business requires some sort of continuity or system or repetition of similar transactions. (*Chow Yoong Hong* v. *Choong Fah Rubber Manufactory*[6]). If business of moneylending cannot be proved by factual evidence so as to make a person a moneylender, presumption under section 3 can be prayed in aid. Here if it is proved that "a person lends a sum of money in consideration of a larger sum being repaid" such person is presumed to be a moneylender unless the contrary is proved. However, section 2 and section 3 of the Ordinance excludes a number of persons, organisations and societies from the scope of the definition and presumption of a moneylender. These two sections, therefore, do not regard their businesses as those of moneylending, though the transactions of which they are parties involve the lending of money. One such person specially excluded from being a moneylender is mentioned in paragraph (c) of section 2 of the Ordinance. He is "any person . . . *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and the purposes whereof he lends money". The English Moneylenders Act, 1900 contains a similar exclusion clause, which has been the subject of many judicial decisions. The principle established by all these decisions, we respectfully agree, is that the question whether a person is a moneylender or not is one of fact and that our task is to see whether the primary or principal object of his business as distinguished from incidental parts of his business is one of moneylending.

In *Litchfield* v. *Dreyfus*,[7] an art dealer who sold pictures to his customers on credit terms and for payment of the amounts due to him he took from his customers bills which he discounted or renewed from time to time was held not to be a moneylender, because the primary object of his business was not the lending of money but the sale of antiques and pictures. Farwell J. said —

> "The Act was intended to apply only to persons who are carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship."

Similarly, in *Transport and General Credit Corporation* v. *Morgan*[8] a company selling goods on hire-purchase terms in order to finance its business issued trust notes backed up by two trustees in whose favour all its hire-purchase agreements were lodged and all its assets were charged as a floating charge as security against the trust notes, which would be repaid at the end of three, four or five months with interest drawn at 10% per annum. The notes were taken up and discounted by a number of finance houses. When the company defaulted in repaying its notes, on a notice given by the trustees to the company the whole amount of the notes outstanding became immediately payable. Later the company was wound up. The finance houses who were holders of the notes sued the company and the trustees for the repayment. Simonds J. held that by entering into these transactions the finance houses were not moneylenders, and that the transaction "was nothing more than the carrying out of an agreement by a number of finance houses in conjunction with a dealer in a large way in a particular kind of article to finance and develop a particular business".

In *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory*[6] post-dated cheques were issued by the defendant to the plaintiff in exchange of certain outstation cheques belonging to the plaintiff, which he endorsed over to, and whose value was received by, the defendant. Post-dated cheques were also issued by the defendants as a consideration of the plaintiff discounting certain outstation cheques belonging to the defendants. Their Lordships of the Privy Council held that, the true nature of the transaction was not that of a loan but that of buying bills at a discount which is quite different from moneylending. The fact that the discounter, i.e. the buyer, is neither a bank nor a discount house does not matter. There was no loan of money nor promise of repayment. The value of the outstation cheques received by the defendant either

as a result of the plaintiff endorsing over his outstation cheques to the defendant or as a result of his buying at a discount the defendant's outstation cheques was not a loan and that the post-dated cheques were therefore not a promise to repay the loan. The case re-emphasized the importance of looking at the nature of the transaction which the parties have agreed in order to determine whether the principal object of the transaction is moneylending or not.

We now turn to the agreement between the respondents and their client, the guarantee which the appellants gave them and the purchases made by them on behalf of the client and the drawing of the dishonoured drafts. Can we seriously say that the primary object of the respondents' agreement with their client in giving confirming facilities is one of lending money? If the receipt of bills of exchange maturing at certain dates accepted by the customers of an art dealer in *Litchfield* v. *Drey'us* and if purchases by finance houses of notes maturing at certain dates issued by a company carrying on hire-purchase business in order to finance such business in *Transport and General Credit Corporation Ltd.* v. *Morgan*, and if the discounting of cheques in *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* are all not moneylending transactions, it is difficult to see on what ground the respondents' agreement with their client can be held to be a moneylending transaction and the respondents a moneylender. The essence of the transaction is that the client was purchasing goods from a U.K. supplier and that it was doing so through the intermediary of the respondents who acted as an agent and financed the purchases. In this arrangement the respondents or one of their subsidiaries accepted the supplier's drafts in payment for the goods and later drew U.S. dollar drafts for acceptance by the client to get back their money. Thus, instead of there being one bill of exchange drawn by the seller to be accepted by the client, there were two drafts — one drawn by the seller and accepted by the respondents or one of their subsidiaries, and another drawn by the respondents and accepted by the client. Two drafts are involved in every purchase just as there are two agreements entered into by a confirming house. In our view, confirming houses being a recognized institution in the promotion and participation of export trade, and their business being distinct, under no circumstances the transactions into which the respondents entered with their client, with the supplier and with the appellants — all being normal practice of a confirming house — can be held to be moneylending, and the respondents by entering into these transactions a moneylender.

The learned judge in the court below said that it was not disputed that the respondents were a bank. However, we do not find in any of the affidavits used in the case that the respondents were a bank, although its memorandum and articles entitle them to carry on the business of a bank. In any case, a bank is distinct from a confirming house and its obligation is narrower than that of the latter. We therefore hold that the respondents are a person who *bona fide* carries on a business not having for its primary object the lending of money, and that as such they are not a moneylender. To describe a confirming facility as a "camouflage" moneylender, as was submitted by counsel for the appellants, in our view, is an abuse of language as it reflects neither the understanding of the mechanics and ramifications of export trade nor the meaning of "moneylender" and "business of moneylending" within the meaning of the Ordinance. The fact that a purchaser who has no money to pay for the goods there and there uses the services of a confirming house is not borrowing of money. It is a fact of life that for many centuries export trade across national boundaries has been carried on by methods devised mostly by merchants and bankers and that the law only intervenes to sanction the practices which they have legitimately evolved and to disallow those which are contrary to the statute, public morals and policy.

We therefore agree with the learned judge that the appellants' statement of defence did not disclose any serious defence requiring trial at all. There being no triable issue, an application under Order 14 prayed for by the respondents for a final judgment to enforce the guarantee, in our judgment, was correctly made. The decision of the Registrar which was upheld by the learned judge must stand and the appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *T.S. Chong & Co.; John Ang & Co.*

LOH HOCK SENG & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) December 5, 1979]

[Penang — Federal Court Criminal Appeal No. 27 of 1979]

Criminal Law and Procedure — Appeal — Sentence — Death sentence — Should be imposed in proper case — Trafficking in dangerous drug — Dangerous Drugs Ordinance, 1952, s. 39B(1).

In this case the appellants had been convicted on a charge of trafficking in 1550.1 grammes of heroin. Hong Hoo Chong, the second appellant, was sentenced to imprisonment for life and 14 strokes of the rattan. He appealed against the sentence and the Public Prosecutor cross-appealed against the sentence imposed.

Held: in the circumstances of this case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against the appellant, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk. The sentence of death should therefore be substituted for the sentence of imprisonment for life and whipping.

Case referred to:-

(1) *Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1976] 2 M.L.J. 83.

FEDERAL COURT.

R. Rajasingam for the appellant.

Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The two appellants were jointly